United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

B P/S

74-1151

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- -

In the Matter of the Arbitration of
Certain Controversies between

JOHN HOH, as President of BREWERY WORKERS LOCAL 3, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; and NEIL BORRA, as President of BREWERY DELIVERY EMPLOYEES, LOCAL 46, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioners-Appellants,

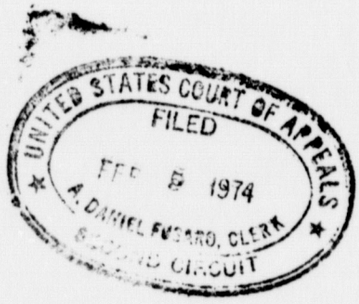
-and-

PEPSICO, INC., and its wholly owned subsidiaries RHEINGOLD CORPORATION and RHEINGOLD BREWERIES, INC.,

Respondents-Appellees.

- -

PETITIONERS-APPELLANTS
MEMORANDUM OF LAW



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STATEMENT OF ISSUES

1. THE CASE WAS IMPROPERLY REMOVED.

2. THE COURT BELOW IMPROPERLY CONSIDERED THE UNIONS' PROBABILITY OF SUCCESS IN THE ARBITRATION PROCEEDING, RATHER THAN THEIR PROBABILITY OF SUCCESS IN THIS PROCEEDING TO COMPEL ARBITRATION.

3. THE COURT BELOW ERRED IN CONSIDERING THE MERITS OF THE DISPUTE BETWEEN THE PARTIES, AS UNDER THEIR COLLECTIVE BARGAINING AGREEMENT THE MERITS OF ALL DISPUTES ARE TO BE RESOLVED BY THE ARBITRATOR.

4. A "BALANCING OF THE EQUITIES" FAVORS THE GRANTING OF THE RESTRAINING ORDER.

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STATEMENT

This memorandum of law is submitted in support of petitioners-appellants appeal from the decision and order of Judge John R. Bartels denying their application for a preliminary injunction to prevent the impending shutdown of the Rheingold Breweries in Brooklyn, New York, pending arbitration between the parties.

On January 31, 1974, appellant Unions, Locals 3

and 46 instituted a proceeding in the New York State Supreme Court, Kings County, to compel arbitration of their claim that respondent Employers had no right under the parties' collective bargaining contract to close down the brewery, during the term thereof. In its aforesaid application the Unions further sought a preliminary injunction with a temporary restraining order to prevent said shutdown pending the determination of the arbitration.

Upon receipt of a courtesy copy of appellants' moving papers but prior to said application having come on to be heard by New York State Supreme Court Justice Abraham J. Multer, who was then presiding in Special Term, Part II of said Court, respondents-appellees sought to remove the matter to the United States District Court for the Eastern District of New York. Justice Multer found the removal ineffectual as having been made prior to the commencement of any action. Then, after having heard argument by counsel for all parties, Justice Multer issued a temporary restraining order, returnable the next day, February 1, 1974 at 9:30 a.m., enjoining appellees from closing the brewery.

On Friday morning, February 1, 1974, appellees filed a second application to remove the proceeding to the United States

Federal District Court for the Eastern District. Judge Bartels sustained the removal, and issued the decision appealed from herein.

FACTS

For the past eighty years or more petitioners-appellants, Brewery Workers Locals 3 and 46, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter "Local 3" and "Local 46" or collectively, "Unions") have been the collective bargaining representatives of some 1200 employees employed at Rheingold's Brooklyn brewery. The most recent collective bargaining agreement between the parties does not expire until June 1, 1976.

In pertinent part, their agreement provides, at page 74, as follows:

> "All complaints or disputes which may arise between the employer and the employees or between the employer and the union shall be settled, if possible, by agreement between the said local union and the employer. If not so settled then the complaint or dispute shall be submitted to the adjustment committee herein provided for.
>
> "(a) There shall be a committee to be known as the adjustment committee for the purpose of amicably settling and mediating all complaints and disputes which may arise between the employer and the employees or union . . . .

"(f) In the event said adjustment committee shall be unable to reach a decision by majority vote, said dispute or complaint shall be submitted to arbitration...."

The contract goes on to provide that:

"All complaints or disputes which have not been settled as hereinbefore provided, shall thereupon be submitted to arbitration...."

On January 25, 1974, during the first year of the previously described agreement, and without prior warning, the Employer, by letter, notified the Unions that all operations at the Brooklyn brewery would cease at the close of business on Friday, February 1, 1974, and that all employees would be terminated at that time.

The Unions immediately demanded arbitration and, in accordance with the grievance and arbitration machinery provided for in the agreement, took all steps necessary to proceed to arbitration with the utmost expedition.

A preliminary injunction is essential to maintain the status quo during the pendency of the arbitration proceedings

for the following reasons:

(a) The respondents-appellees' employees have industry-wide seniority rights accumulated over a period of 20 or 30 years which will be adversely affected if there is a significant break in continuous service. It is virtually impossible to place a money value on these rights.

(b) The termination of respondents-appellees' brewery employees will cause many of these employees to invoke their industry-wide seniority rights thereby immediately causing an untold number of F. & M. Schaefer Brewing Company employees to be bumped from their jobs. As a further result thereof, valuable pension, welfare and seniority rights of such employees will be hopelessly scrambled.

(c) Any significant break in service involving the discontinuance of employer contributions to the Union Welfare Funds will leave these employees and their families without essential health and life insurance.

(d) Any significant break in continuous service may cause the cutoff of pension rights which all employees accrue and may result in certain employees losing all rights to pension benefits for which they worked as much as 20 or almost 30 years.

Petitioners-appellants seek equitable relief maintaining the status quo until the issues between the parties have been submitted to arbitration and an award rendered.

POINT I

THE CASE WAS IMPROPERLY REMOVED

The parties in their collective bargaining agreement specifically provided for expedited arbitration of disputes involving strikes or lockouts. They further stipulated that the State Courts were to have jurisdiction in connection with such arbitrations and agreed that neither party would remove such proceedings to the federal courts. They "expressly waive their right to seek such removal".

This provision was the result of a long history of difficulty in actually effecting the speedy arbitrations provided for. For whenever either party invoked the assistance of the court to compel or confirm arbitration, the respondent would remove the matter, thereby frustrating the provision for immediate disposition. Thus, they finally agreed that only the State Court would have jurisdiction in such cases, that neither party would seek removal to the federal courts and they "expressly waive their right" to do so.

The relevant contract provision states:

> "The award of the Arbitrator may be enforced in the courts of the State of New York. It is expressly agreed that neither the employer nor the union or any employee will seek removal of any such proceeding in the courts of the State of New York to the Federal Courts and they expressly waive their right to seek such removal."

As arbitration proceedings are consensual in nature, such provisions are valid and enforceable.

Indeed, Section 9 of the Federal Arbitration Act, 9 U.S.C.A. Section 9, in keeping with the traditional reliance upon parties to determine the parameters of arbitration, provides that the parties shall "specify the court" for confirmation of any award. And the Courts have sustained their right to do so.

> Reed & Martin, Inc. v. Westinghouse Electric Corp., 439 Fed. 2d 1268.

As it was the clear and unambiguous agreement* of the parties to waive resort to removal proceedings in a case such as that before the court, involving as it does a subject for speedy arbitration under the contract, appellees' action in attempting to remove the same was improper and the Court below should have so found.

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* On the argument in the Court below, petitioning Unions offered to testify as to the history and meaning of the said provision.

POINT II

THE COURT BELOW IMPROPERLY CONSIDERED THE UNIONS' PROBABILITY OF SUCCESS IN THE ARBITRATION PROCEEDING, RATHER THAN THEIR PROBABILITY OF SUCCESS IN THIS PROCEEDING TO COMPEL ARBITRATION.

We respectfully submit that the Court below misunderstood the standard for the issuance of a preliminary injunction herein, i.e. that petitioners make a clear showing of ultimate probable success. It erroneously considered the Unions' likelihood of success before the Arbitrator on the matters to be submitted to him. The proper test was the Unions' success on the matter before the court, i.e. whether the alleged disputes are arbitrable, and the Court should compel arbitration thereof.

The relief sought by the Unions was an order pursuant to §301 of the Labor Management Relations Act, 29 U.S.C.A. §186, compelling the Employers to proceed to arbitration, and further to preliminarily enjoin them from closing the Rheingold Brewery, in order to preserve the subject of the arbitration proceeding. Thus, the matter for determination before the Court below was whether the claims raised by appellants are arbitrable under their collective bargaining agreement. And it was the probability of success in this connection which should have been considered in determining whether to issue a preliminary injunction. As the court stated in Meat Cutter v. National Tea Co., 346 F.Supp. 875, 81 LRRM 2027, 2032 (WD Pa. 1972):

"The foregoing discussion disposes of the question of arbitrability and also makes it appear that plaintiffs are likely to succeed in their contention that all disputes under this contract including all or some of the claims now made by them are subject to arbitration. We do not at this time express any thoughts on the ultimate outcome of the arbitration since these matters are for the arbitrator.

"We will now turn to the usual considerations in addition to likelihood of success on the merits which govern the issuance of preliminary injunctions." (Emphasis supplied) 81 LRRM at 2032.

See also Local Div. 1098 AA SER v. Eastern Greyhound, 225 F.Supp. 28, 55 LRRM 2078 (DC DC 1963).

The cases relied on by appellees, and the Court below in its opinion, are inapposite dealing solely with the question of likelihood of success in the suit before the Court, and not involving probability of success in any arbitration proceeding.

That the Unions would succeed in compelling arbitration here is not only likely, but is a reasonable certainty. The broad arbitration clause of the collective bargaining agreement without doubt covers the matters which appellants seek to arbitrate, encompassing as it does "All complaints or disputes which may arise" between the parties. (See Contract, Exhibit A annexed to Petition, page 74). In fact, appellees admitted

before the Court below, as noted in the Court's decision, that "they also agree to arbitrate these claims".

Thus, there can be no doubt that appellants made a clear showing of ultimate probable success, sufficient to sustain a temporary injunction.

POINT III

THE COURT BELOW ERRED IN CONSIDERING THE MERITS OF THE DISPUTE BETWEEN THE PARTIES, AS UNDER THEIR COLLECTIVE BARGAINING AGREEMENT THE MERITS OF ALL DISPUTES ARE TO BE RESOLVED BY THE ARBITRATOR.

The Court below erred in deciding the disputed question sought to be submitted to arbitration, of whether the appellees had the right to shut down the Brooklyn brewery prior to the expiration date of the collective bargaining agreement. The Court relied on a provision of the contract which states that if the employer suspends or discontinues the operations of its plants "... its obligations hereunder shall be correspondingly suspended or discontinued." The Court thus passed on the merits of the question and substituted its judgment for that of an arbitrator, when the collective bargaining agreement between the parties provides that an arbitrator shall decide all disputes arising between the parties to the contract.

At least since the Steelworkers trilogy was decided by the United States Supreme Court in 1960 (United Steelworkers of America v. American Manufacturing Company, 363 U.S. 564; United Steelworkers of America v. Warrior and Gulf Navigation Company, 363 U.S. 574; United Steelworkers

of America v. Enterprise Wheel and Car Corp., 363 U.S. 593), it has been settled that it is for the arbitrator, not the Court to resolve disputes arising under a collective bargaining agreement.

In United Steelworkers of America v. American Manufacturing Co., supra, at page 567, the court noted that:

> "The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. In these circumstances the moving party should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for."

In the Steelworkers trilogy, the agreements all contained a "standard form" of grievance and arbitration procedure. Such contracts provided for the arbitration of all disputes between the parties "as to the meaning, interpretation and application of the provisions of this agreement." If under such a contract, the court is not to consider the merits of the grievance, a fortiori, under the grievance and arbitration provisions of the collective bargaining agreement between the parties here, the matters in dispute must be

resolved by an arbitrator, as the contract contains the broadest type of grievance and arbitration provision.

Thus the contract provides, at page 74:

> "All complaints or disputes which may arise between the employer and the employees or between the employer and the union shall be settled, if possible, by agreement between the said local union and the employer. If not so settled then the complaint or dispute shall be submitted to the adjustment committee herein provided for.
>
> "(a) There shall be a committee to be known as the adjustment committee for the purpose of amicably settling and mediating all complaints and disputes which may arise between the employer and the employees or union...."
>
> "(f) In the event said adjustment committee shall be unable to reach a decision by majority vote, said dispute or complaint shall be submitted to arbitration...."

The contract goes on to provide that:

> "All complaints or disputes which have not been settled as hereinbefore provided, shall thereupon be submitted to arbitration...." (Emphasis supplied)

In the court below, the Union urged that the Employers had made an oral commitment to it not to close the Brooklyn brewery prior to the termination of the current collective bargaining agreement and that they had no intention of adhering to such agreement when they entered into it. In

addition, the Unions claimed that the Employers failed to disclose material information concerning continued operations of the brewery. The appellees denied making such an agreement. The plant closure was scheduled during the contract period, resulting in the present dispute.

Clearly there is a "complaint or dispute which" has arisen "between the Employer and the employees or union", and such dispute must be submitted to arbitration for resolution.

The Court below fell into the very same error made by the New York courts, which the United States Supreme Court condemned in the American Manufacturing case, supra. The New York Court of Appeals had held in International Association of Machinists v. Cutler-Hammer, Inc., 297 N.Y. 519, that:

> "'If the meaning of the provision of the contract sought to be arbitrated is beyond dispute, there cannot be anything to arbitrate and the contract cannot be said to provide for arbitration'".

The Supreme Court emphatically disagreed. It noted that:

> "The collective agreement requires arbitration of claims that courts might be unwilling

to entertain. In the context of the plant or industry the grievance may assume proportions of which judges are ignorant. Yet, the agreement is to submit all grievances to arbitration, not merely those that a court may deem to be meritorious."

"The courts, therefore, have no business weighing the merits of the grievance, considering whether there is equity of a particular claim, or determining whether there is particular language in the written instrument which will support the claim. The agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious." United Steelworkers of America v. American Manufacturing Company, at page 567, 568.

There are a number of cases where issues similar to the ones in this case were ordered to be submitted to arbitration. Thus, in Ice Cream Drivers v. Borden, Inc., 433 F. 2d 41 (CA 2 1970) the parties were ordered to proceed to arbitration of:

"... the disputes between Borden, Inc. and Ice Cream Drivers and Employees Union, Local 757, arising out of Borden Inc.'s closing of its manufacturing operations in the area."

See also

Local 294, IUE v. Three Rivers Industries, 78 LRRM 2090 (DC Mass. 1971);

IUE v. Radio Corp. of America, 77 LRRM 2201 (DC NJ 1971).

Thus there can be no doubt that the Court below was in error when it passed on the merits of the underlying dispute between the parties. That matter is solely for the arbitrator to determine.*

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* It is of some interest in this connection, however, that in the one arbitration case decided under the contract before the court, involving an employer's right to shutdown in midterm, the arbitrator held that the employer could not do so, despite the fact that the company cited the contract provision which involves a "Discontinuance of Operations", relied on by the appellees here. In the Matter of Jos. Schlitz Brewing Co., 58 LA 653 (Feb. 1972, Lande, J., Arbitrator).

POINT IV

A "BALANCING OF THE EQUITIES" FAVORS THE GRANTING OF THE RESTRAINING ORDER.

An application for injunctive relief is equitable in nature. Thus, this Court must weigh the relative hardships to be imposed, in making its determination.

If, as has been urged, the underlying disputes between the parties are arbitrable under the collective bargaining agreement, the parties are to be directed to proceed to arbitration forthwith.

However, an Order by the Court that the dispute be submitted to arbitration, without more, would be meaningless. For by the time the arbitration could be held and a decision rendered in favor of the Unions, the plant which is the subject of the arbitation will be dismantled and closed, the employees will have been terminated, and the contract provisions and guarantees rendered nugatory. The victory of the Unions would be an empty one and the Order of the Court an idle gesture.

Under such circumstances the Unions have asked that pending the arbitration hearing and the award of the arbitrator, the Employers be ordered to maintain the status quo. The Unions also requested the Court to use its equitable power to grant a

temporary restraining order staying the Employers from taking any further action relative to the closing of its plant or the termination of employment of its employees pending a hearing of the instant motion by the Court.

The inherent power of the Court to grant such relief is beyond question, where not to do so would cause irreparable injury to parties concerned and where a decision of the Court in favor of one of the parties "would be but an empty victory". Locomotive Engineers v.B & O Railroad, CCA 7C 1962, 310 F.2d 513, 51 LRRM 2579; (aff'd 372 U.S. 284).

A similar situation was considered by the Supreme Court of the United States in Locomotive Engineers v. M.K.T. Railroad, 363 U.S. 528 (1960).

That case involved a dispute between a railroad and a union which was being submitted to the National Railroad Adjustment Board for determination. Pending the hearing and determination of the dispute by the Board, the Company asked that the Union be enjoined from striking, and the Union requested that the Employer be required to maintain the status quo and not double freight runs and eliminate the jobs of certain men, which was the subject to be submitted to the Adjustment Board. The

District Court had issued an order restraining any strike and directing the Company to restore the status quo. Said Chief Justice Warren for the Court:

> "If the District Court is free to exercise the typical powers of a Court of Equity, it has the power to impose conditions requiring maintenance of the status quo..."

The Court continued:

> "...To fulfill its function the District Court must also consider the hardships, if any, that would arise if the employees were required to await the Board's sometimes long-delayed decisions without recourse to a strike. But this examination of the nature of the dispute is so unlike that which the Adjustment Board will make of the merits of the same dispute, and is for such a dissimilar purpose, that it could not interfere with the later consideration of the grievance by the Adjustment Board...
>
> "It is not difficult to perceive how the condition imposed in this case could be deemed to serve to protect the jurisdiction of the Baord. The dispute out of which the judicial controversy arose does not merely concern rates of pay or job assignments, but rather involves the discharge of employees from positions long held and the dislocation of others from their homes. From the point of view of these employees, the critical point in the dispute may be when the change is made, for, by the time of the frequently long-delayed Board decision, it might well be impossible to make them whole in any realistic sense.
>
> "If this be so, the action of the District Judge rather than defeating the Board's jurisdiction, would operate to preserve that jurisdiction by preventing injury so irreparable that a decision of the Board in the Union's favor would be but an empty victory."

We have taken the liberty of quoting from the Supreme Court's decision at length because it is so apposite to the case at bar, and applies here with equal force.

More recently, in Morrison Cafeterias, Inc. v. NLRB, 431 F.2d 254, at 257 (8th Cir. 1970) the Court stated:

> "...we recognize that we are interfering to a degree with the petitioners' right to close the Little Rock cafeteria. But Darlington recognizes the need to balance employer and employee rights (id. at 269) and we feel that such a balancing requires that employees have the right to have their representative bargain for them as to the effect the closing will have on them even though such bargaining may place some burden on the employer."

Judge Marvin Frankel, in NMU v. Commerce Tankers, 325 F. Supp. 360, at 366 (S.D.N.Y. 1971) considered and applied these same principles in confirming an award against an employer who attempted a sale of his business, in that case a ship. Judge Frankel cited and relied on Livingston v. Wiley, 376 U.S. 543, in which the Supreme Court discussed the need for balancing the quities of an employer and its employees, albeit in a

different context. He stated:

> "Concentrating upon this - and upon the fact that the award to be enforced is itself injunctive in nature - defendant and the intervenor have devoted much argument to 'weighing the equities,' calculating in large numbers their monetary loss if they are barred from executing the sale transaction arranged in the teeth of defendant's agreement with the NMU. Against this, they attempt to show that the Union's loss is modest and easily compensable if they are allowed now to go ahead with their deal. The analysis, upon full reconsideration, is not impressive. Apart from the fact that injunctive relief, as the seasoned Arbitrator determined, is the only kind truly effective and what defendant must be deemed to have bargained for, the equities favor the NMU and disfavor the Companies by a heavy preponderance. If the defendant may simply shirk off the vessel and the collective agreement, the position of the Union (and its members) can never be restored or be accurately compensated for in money terms. The Companies have deemed that hurt fully curable by their offer of a bond to make up lost pension and welfare contributions should the Union ultimately win. This treats the union as some sort of business devoted to the filling of its treasury and its 'funds'. Whether or not unions always cleave to their ideals, this is scarcely their nature or the measure of their legal rights. Omitted from the reckoning is the heart of the matter - the interest in 'the preservation of work' for its members, Intercontinental Container Tr. Corp. v. New York Ship. Assn, supra, 426 F.2d at 887, as well as union power - which the companies here do not even try to reckon in dollar terms."

(The above decision was reversed, however, on different grounds not here relevant).

The factors weighed by Judge Frankel are equally present in this case. Here too, the equities favor the employees and

the Union and disfavor the Company by a heavy preponderance. Here also, we are not only faced with loss of welfare benefits, pensions, vacations, etc., but with loss of jobs which "can never be restored or be accurately compensated for in money terms."

The Court should further consider that the Employers have indicated that, in any event, they will need a number of employees for the next few weeks to do clean-up, removal of cans and bottles, etc., thus requiring that the plant remain open and be maintained for this purpose.

The Court should, therefore, in line with the considerations set forth by Chief Justice Warren in the M.K.T. case, supra, fashion a remedy which will preserve the subject of the arbitration and balance the equities, giving due regard to the heavier and irreparable injury which a termination of operations at the Brooklyn plant must impose upon its 1200 employees.

CONCLUSION

For all of the foregoing reasons this Court should reverse the ruling of the court below, direct the parties to proceed to arbitration forthwith, and enjoin the respondents-appellees from shutting down the brewery or terminating the employees pending the hearing and determination of the arbitration.

Respectfully submitted,

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